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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

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Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

1. Text of the draft articles provisionally adopted by the Commission so far on first reading

1. The text of the draft articles provisionally adopted so far by the Commission are reproduced below.

[CHAPTER I. GENERAL PROVISIONS]*

Article 1

Scope of the present articles

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

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* Designation of the chapter is provisional. For commentaries to draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20, see General Assembly Official Records, forty-ninth session, Supp. No. 10, (A/49/10) pp. 388-437.

[CHAPTER II. PREVENTION]*

Article 11**

Prior authorization

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required in case a major change is planned which may transform an activity into one referred to in article 1.

Article 12

Risk assessment

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of such activity. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as in the environment of other States.

Article 13

Pre-existing activities

If a State, having assumed the obligations contained in these articles, ascertains that an activity involving a risk of causing significant transboundary harm is already being carried out in its territory or otherwise under its jurisdiction or control without the authorization as required by article 11, it shall direct those responsible for carrying out the activity that they must obtain the necessary authorization. Pending authorization, the State may permit the continuation of the activity in question at its own risk.

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* Designation of the chapter is provisional. For commentaries to draft articles 1, 2 (paras. (a), (b) and (c)), 11 to 14 bis [20 bis], 15 to 16 bis and 17 to 20, see General Assembly Official Records, forty-ninth session, Supp. No. 10, (A/49/10) pp. 388-437.

** The present numbering is provisional and follows that proposed by the Special Rapporteur in his reports.

Article 14*

Measures to prevent or minimize the risk

States shall take legislative, administrative or other actions to ensure that all appropriate measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

Article 14 bis [20 bis]

Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

Article 15

Notification and information

1. If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm, the State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required.

2. Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

Article 16

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing or minimizing the risk of causing significant transboundary harm.

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* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

Article 16 bis

Information to the public

States shall, whenever possible and by such means as are appropriate, provide their own public likely to be affected by an activity referred to in article 1 with information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 17

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 18

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them and without delay, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent or minimize the risk of causing significant transboundary harm, and cooperate in the implementation of these measures.

2. States shall seek solutions based on an equitable balance of interests in the light of article 20.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution the State of origin shall nevertheless take into account the interests of States likely to be affected and may proceed with the activity at its own risk, without prejudice to the right of any State withholding its agreement to pursue such rights as it may have under these articles or otherwise.

Article 19

Rights of the State likely to be affected

1. When no notification has been given of an activity conducted in the territory or otherwise under the jurisdiction or control of a State, any other State which has serious reason to believe that the activity has created a risk of causing it significant harm may require consultations under article 18.

2. The State requiring consultations shall provide technical assessment setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1, the State requiring consultations may claim an equitable share of the cost of the assessment from the State of origin.

Article 20

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 18, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing or minimizing such risk or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing or minimizing such risk or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article A [6]*

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific legal obligations owed to other States in that regard.

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* Articles A, B, C and D deal with general principles. The placement of these articles will be determined once all the articles on the topic have been adopted on first reading.

Article B [8 and 9]

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Article C [9 and 10]

Liability and reparation*

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article D [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

2. Text of draft articles A [6], B [8 and 9] C [9 and 10] D [7] with commentaries thereto provisionally adopted by the Commission at its forty-seventh session

2. The text of draft articles A [6], B [8 and 9], C [9 and 10] and D [7] with commentaries thereto provisionally adopted by the Commission at its forty-sixth session and produced below.

Article A [6]

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Commentary

(1) This article sets forth the principle that constitutes the basis for the entire topic. It is inspired by Principle 21 of the Declaration of the

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* As is clear from the phrase "in accordance with the present articles" the substantive content of this article is left to later elaboration of the articles on liability. At this stage the article is a working hypothesis of the Commission.

United Nations Conference on the Human Environment 1/ and Principle 2 of the Rio Declaration on Environment and Development. 2/ Both principles affirm the sovereign right of States to exploit their own resources, in accordance with the Charter of the United Nations and the principles of international law.

(2) The adopted drafting generalizes Principle 21, since Article A is not limited only to activities directed to the exploitation of resources, but encompasses within its meaning all activities developed in the territory or otherwise under the jurisdiction or control of a State. On the other hand, the limitations referring to the freedom of a State to carry on or authorize such activities are made more specific than in Principle 21, since such

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1/ Principle 21 of the Declaration of the United Nations Conference on the Human Environment reads as follows:

> "States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

2/ Principle 2 of the Rio Declaration on Environment and Development reads as follow:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, document A/CONF.151/26/Rev.1 (vol. I).

limitations are constituted by the general obligation that a State has to prevent or minimize the risk of causing significant transboundary harm as well as the specific State obligations owed to other States in that regard. 3/

(3) The activities to which this article applies are defined in article 1. The present article speaks of risk of causing significant transboundary harm, while the other two Principles - Principle 21 of Stockholm and Principle 2 of the Rio Declarations - speak of causing transboundary damage. In practical terms, however, prevention or minimization of risk of causing harm is the first step in preventing the harm itself.

(4) In that sense, the principle expressed in this article goes further in the protection of the affected States rights and interests and is specifically applicable to hazardous activities, that is, activities which involve a risk of causing transboundary harm.

(5) The general obligation to prevent transboundary harm is well established in international law 4/, but article A recognizes a general obligation on the State of origin to prevent or minimize the risk of causing transboundary harm, which means that the State must ensure that the operator of an activity within the scope of articles 1 and 2 takes all adequate precautions so that transboundary harm will not take place, or if the activity is one of those which do not admit of a total elimination of the risk, whatever the precautions taken, then the State of origin must take all necessary steps, including consultation with the presumably affected State or States, to make the operator take such measures as are adequate to minimize the risk.

(6) In general agreement with the previous paragraph, is Article 10 of the Legal Principles for Environmental Protection and Sustainable Development, which was drafted by the Experts Group of Environmental Law of the World Commission on Environment and Development:

3/ The Commission may, at some point, add further limitations to article 1 in the form of a list of activities or a list of substances manipulated by such activities.

4/ This general obligation of the States has its foundation in international practice. The General Commentary, General Assembly Official Records, forty-ninth session Supp. No. 10 (A/49/10), pp. 389-390. See also Commentary to article 1 (ibid., pp.391/396).

"States shall, without prejudice to the principles laid down in Articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant." 5/

(7) The principle is thus referred to in the commentary:

"Subject to certain qualifications to be dealt with below, Article 10 lays down the well-established basic principle governing transboundary environmental interferences which causes, or entails a significant risk of causing, substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction". 6/

(8) It is considered in this work that this principle is an implicit consequence of the duty not to cause transboundary harm:

"It should be noted that the principle formulated above does not merely state that States are obliged to prevent or abate transboundary environmental interferences which *actually* cause substantial harm, but also that they are obliged to prevent or abate activities which entail a *significant risk* of causing such harm abroad. The second statement states as a matter of fact *explicitly* what must already be deemed to be *implicit* in the duty to prevent transboundary environmental interferences *actually* causing substantial harm and serves to exclude any misunderstanding on this point." 7/

(9) In practical terms, then, prevention or minimization of risk of causing harm, is the first step in preventing the harm itself. Making explicit what

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5/ *Environmental Protection and Sustainable Development, Legal Principles and Recommendations*, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development. (London, Dordrecht and Boston, Graham and Trotham, Nijhoff), p.75.

6/ Id.p.75.

7/ Id. p.78. However, "while activities creating a significant risk of causing substantial harm must in principle be prevented or abated, it may well be that, in the case of certain dangerous activities, the unlawfulness will be taken away when all possible precautionary measures have been taken to preclude the materialization of the risk *and the benefits created by the activity must be deemed to far outweigh the benefits to be obtained by eliminating the risk* which would require putting an end to the activity itself." (p.79)

is implicit in the above mentioned general obligation of prevention is already an important advance in the law referring to transboundary harm, since it gives clear foundation to all other obligations of prevention, and particularly to those of notification, exchange of information and consultation, which originate in the right of the presumably affected State - corresponding to this general obligation of prevention - to participate in the general process of prevention.

(10) The article has two parts. The first part affirms the freedom of action by States and the second part addresses the limitations to that freedom. The first part provides that the freedom of States to conduct or permit activities in their territory or under their jurisdiction or control is not unlimited. This is another way of stating that the freedom of States in such matters is limited. The Commission however, felt that it would be more appropriate to state the principle in a positive form, which presupposes the freedom of action of States, rather than in a negative form which would have emphasized on the limitation of such freedom.

(11) The second part of the article enumerates two limitations to such State freedom. First, such freedom must be subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. Second, such freedom must be subject to any specific obligations owed to other States in that regard. The words "in that regard" refer to preventing or minimizing the risk of causing significant transboundary harm.

(12) The first limitation to the freedom of States to carry on or permit activities referred to in article 1 is set by the general obligation of States to prevent or minimize the risk of causing significant transboundary harm. The general obligation stipulated under this article should be understood as establishing an obligation of conduct. The article does not require that a State guarantee the absence of any transboundary harm, but that it takes all the measures required to prevent or minimize such harm. This understanding is also consistent with the specific obligations stipulated in various articles on prevention.

(13) The meaning and the scope of the obligation of due diligence have been explained in paragraphs 5-10 of the commentary to article B [8 and 9].

Article B [8 and 9]

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

Commentary

(1) This article, together with article D [7] on "cooperation" provides the theoretical foundation for the articles on prevention that the Commission adopted last year. The articles set out specific and detailed obligations of States to prevent or minimize significant transboundary harm. The article is short and concise. It provides that States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm. The word "measures" refers to all those specific actions and steps that are specified in the articles, which have already been adopted, on prevention and minimization of transboundary harm.

(2) This article incorporates a number of elements contained in article 14, "Measures to prevent or minimize risk" which was already adopted last year. 8/ At the appropriate time, article 14 will be brought into harmony with the present article and will deal exclusively with implementation, following, for example, the model in the Convention on Environmental Impact Assessment in a Transboundary Context. A new article 14 could read:

> "States shall take all legislative, administrative or other action to implement the provisions of these articles (on prevention, etc.)."

(3) Article B, then, sets up the principle of prevention that concerns every State regarding activities of article 1. Article 14 specifies the *modalities* whereby the State of origin may discharge the obligations of prevention which have been established in pursuance of the present principle, i.e. by legislative, administrative or other action such as generally enforcing the laws, administrative decisions and policies which the State has approved in its concern of preventing or minimizing the risk of transboundary harm. The

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8/ Paragraphs (1) to (9) of the commentary to this article are taken from article 14. When article 14 is redrafted appropriate adjustments will be made.

practical measures of precaution, such as putting filters in chimneys or including - or not including - certain elements in processes of production, concern operators of activities of article 1.

(4) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(5) An obligation of due diligence as the standard basis for the protection of the environment from harm, can be deduced from a number of international conventions 9/ as well as from the resolutions and reports of international conferences and organizations. 10/ The obligation of due diligence was recently discussed in a dispute between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries. 11/

(6) In the Alabama case (United States v. United Kingdom), the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

9/ See for example, art. 194, para. 1, of the United Nations Convention on the Law of the Sea, A/CONF.62/122; arts. I, II, and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter in International Legal Materials, vol. 11, p. 1294; art. 2 of the Vienna Convention for the Protection of the Ozone Layer; ibid, vol. 26, p. 1529; art. 7, para. 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities, International Legal Materials, vol. 28, p. 868; art. 2, para. 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, doc. E/ECE/1250; and art. 2, para. 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31, p. 1313.

10/ See Principle 21 of the World Charter for Nature, General Assembly resolution 37/7 adopted on 28 October 1982; Principle VI of Draft Principles relating to weather modification prepared by the WHO and by UNEP, in Digest of United States Practice in International Law, 1978, p. 1205.

11/ See New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle du Rhin par les produits chimiques, in Annuaire Français de Droit International, vol. 33, 1987, pp. 719-727.

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, ..." 12/

(7) The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns". 13/ The Tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The Tribunal stated that "[t]he British Case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient". 14/

(8) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> "The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question." 15/

12/ The Geneva Arbitration (The Alabama case) in J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-73.

13/ Ibid., p. 612.

14/ Ibid.

15/ [1932] A.C., p. 580 (H.L.(Sc)).

(9) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent or minimize the risk of significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or minimize transboundary harm and, second, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(10) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence requires a State to keep abreast of technological changes and scientific developments and to determine not only that equipment for a particular activity is working properly, but also that it meets the most current specifications and standards.

(11) The Commission takes note of Principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards

applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." 16/

(12) Similar language is found in Principle 23 of the Stockholm Declaration. That Principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community". 17/ It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether an appropriate standard of due diligence has been exercised by a State. But a State's economic level cannot be used to discharge a State from its obligation under this article.

(13) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize such harm. In the view of the Commission, the word "minimize" should be understood in this context to mean reducing to the lowest point the possibility of harm.

Article C [9 and 10]

Liability and reparation*

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Commentary

(1) This article forms the basis for the future articles addressing issues of liability and reparation. It has been adopted as a working hypothesis due to the circumstance that the chapter of the draft articles which is devoted to liability has not yet been adopted by the Commission. Notwithstanding that circumstance, it was decided that at this point the Commission should

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16/ Doc. A/CONF.151/26/Rev.1 (vol. I), p. 3.

17/ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, doc. A/CONF.48/Rev.1.

* As is clear from the phrase "in accordance with the present articles" the substantive content of this article is left to later elaboration of the articles on liability. At this stage the article is a working hypothesis of the Commission.

anticipate a very general principle as such a working hypothesis for the next stage in the development of the topic, namely that of remedial measures which will be applied in case of significant transboundary harm.

(2) The principle contained in article C is not altogether new to the Commission. At its fortieth session, in 1988, the Commission stated the following:

> "There was general agreement that the principles identified by the Special Rapporteur in paragraph 86 of his Fourth Report were relevant to the topic and were acceptable in their general outline. Those principles were as follows: (1) The draft articles must ensure each State as much freedom of choice within its territory as is compatible with the rights and interests of other States. (2) The protection of such rights and interests require the adoption of measures of prevention and if injury nevertheless occurs, measures of reparation. (3) In so far as may be consistent with those two principles, the innocent victim should not be left to bear his loss or injury)." 18/

(3) The obligation set forth in the article must, then, be understood in the context of whatever articles the Commission will adopt on liability in the future. The words "in accordance with the present articles" are intended to convey the understanding that the principles of liability and of reparation are subject to the terms and conditions set forth in the present and future articles on the topic.

(4) The principle of liability and reparation is a necessary corollary and a complement to article A, in regard to the freedom of States to carry out or permit activities referred to in article 1 in their territory or otherwise under their jurisdiction or control. As was seen, that principle establishes the conditions on prevention or minimization of the risk, under which the activities that give rise to it are to be considered not prohibited by international law. Article C, on the other hand, determines the other condition: the obligation to make reparation, pursuant to the specific articles on liability which the Commission will establish, whenever significant transboundary damage arises. A regime which permits the conduct of activities hazardous to other States without any form of reparation when damage arises is not conceivable.

18/ Yearbook ... 1988, vol. II, (Part Two), doc. A/43/10, para. 82. Emphasis added.

(5) Since the Commission has not yet agreed on a specific regime of liability, the article on the principle of liability is without prejudice to the question of (a) the party that is liable and must make reparation; (b) the forms and the extent of reparation; (c) the harm that is subject to reparation; and (d) the basis of liability. This explains the marked difference in the structure of this article and those of articles A [6], B [8 and 9] and D [7]. Unlike those provisions, which identify outright who bears the obligation, this article only establishes - as a working hypothesis - that there is liability and an obligation to make reparation.

(6) As regards the basis of liability, it can only be advanced that such basis is not perforce the violation of an international obligation. The Commission, when addressing the whole framework of liability and its specific articles, will take note of a variety of possibilities. For example, whether liability should be based on a causal relationship or on the breach of the obligation of due diligence or whether both of these bases could be used depending upon the party or parties to which liability is attributable.

(7) In fact, in international practice there are several ways of remedying the transboundary damage caused by a hazardous activity to persons or property, or the environment. One is the absolute liability of the State, as in the Convention on International Liability for Damage Caused by Space Objects of 29 March 1992 19/, the only case of State absolute liability. Another way is to channel liability on to the operator, and leaving the State out of the picture, as in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 9 March 1993. 20/ Still another is to assign to the State some subsidiary liability for that amount of compensation not satisfied by the operator, such as the Convention for the Third Party Liablility in the Field of Nuclear Energy of 29 July 1960 21/ and the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963. 22/

19/ United Nations, Treaty Series (UNTS), vol. 961, p. 187.

20/ ETS, No. 150

21/ UNTS, vol. 956, p. 251.

22/ Ibid., vol. 1063, p. 265.

(8) The way in which the principle has been drafted does not pre-empt any possibility regarding the future work of the Commission, nor rules out any form of liability from being embraced. Indeed, a type of alternative may be considerd suitable which would make the State responsible only in cases where due diligence is breached, in a way similar to that of article 7 of the articles on the Law of the Non-navigational Uses of International Watercourses.

(9) In including this article within the set of fundamental principles of the topic, the Commission takes careful note of Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration in which States are encouraged to cooperate in developing further international law regarding liability and compensation for environmental damage caused by activities within their jurisdiction or control to areas beyond their national jurisdiction. These Principles demonstrate aspirations and preferences of the international community.

(10) It must be noted that in the English version, "reparation" is used instead of "compensation", which is the word usually associated with "liability". The Commission found, however, that the concept of compensation in the meaning of article 8 of the draft articles on State responsibility, i.e. as the payment of a sum of money, is hardly applicable to some instances of remedying environmental harm, where restoration is the best solution. Restoration, being an attempt of returning to the status quo ante, may be considered as a form of restitutio naturalis and certainly not of compensation. Also in the field of environmental harm, the introduction into a damaged ecosystem, by way or reparation, of certain equivalent components to those diminished or destroyed is not a monetary compensation, although it may be considered a form of compensation by equivalent. Such solution is envisaged in certain instruments. 23/ "Reparation", then, must be understood in its most general meaning, as including some of the categories of consequences that the same term has in article 6 bis, Part Two, of the State Responsibility draft.

(11) The Commission examined the treaty practice by which States have either identified a particular activity or substances with injurious transboundary consequences and established a liability regime for the transboundary harm.

23/ See for example, Article 2 (8) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, op. cit.

Activities involving oil transportation, oil pollution and nuclear energy or material are prime targets of these treaties. 24/ Some conventions address the question of liability resulting from activities other than those involving oil or nuclear energy or material. 25/ Many other treaties refer to the issue of liability without any further clarification as to the substantive or procedural rules of liability. These treaties, while recognizing the relevance of the liability principle to the operation of the treaty, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or to expect that such rules will be

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24/ See in particular the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, IMOC, Official Records of the International Legal Conference on Marine Pollution Damage, London, 1969; the 1984 Protocol to the 1969 Convention, IMO, International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, LEG/CONF.6/66 of 25 May 1984; Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources of 17 December 1976, UNEP, Selected Multilateral treaties in the Field of the Environment, p. 474; Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, United Nations, Treaty Series (UNTS), vol. 956, p. 251; Convention on the Liability or the Operators of Nuclear Ships, of 25 May 1962, IAEA, International Conventions relating to Civil Liability for Nuclear Damage, Legal Series No. 4, rev. ed. (Vienna, 1976), p. 34; Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, UNTS, vol. 1063, p. 265; Convention relating to Civil Liability in the Field of Carriage of Nuclear Material of 17 December 1971, ibid., vol. 974, p. 255; and the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) of 10 December 1989, Revue de droit uniform (UNIDROIT), 1989, p. 280.

25/ See the Convention on International Liability for Damage Caused by Space Objects of 1972 op. cit., and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 9 March 1993, op. cit.

developed. 26/ Yet other treaties indicate that another instrument will be developed by the parties addressing the question of liability which might arise under the treaties. 27/

(12) The concept of liability has also been developed to a limited extent in State practice. For example, in the Trail Smelter case, the smelter company was permitted to continue its activities, but the Tribunal established a permanent regime which called, under certain conditions, for compensation for injury to the United States interests arising from fume emission even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> "The Tribunal is of the opinion that the prescribed regime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future. But since the desirable and expected result of the regime or measures of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing

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26/ See in the this context the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment for Pollution of 24 April, 1978, UNTS, vol. 1140, p. 133; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, UNTS, vol., p. 120; Convention for the Protection of the Mediterranean Sea against Pollution of 16 February 1976, UNEP, Selected Multilateral Treaties in the Field of the Environment, p. 448; Convention on the Protection of the Marine Environment of the Baltic Sea Area of 9 April 1992, [IMO 1] LDC.2/Circ. 303; Convention on the Protection of the Black Sea Against Pollution, of 21 April 1992, ibid., Circ. 302; Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992, Int'l L. Mat., vol. 31, p. 1330; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, ibid, vol. 31, p. 1312.

27/ See for example, the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica. For the Convention see, Int'l L. Mat., vol. 28, p. 868. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 provides in article 12 that State Parties shall develop a protocol on liability and compensation. For the Convention see, Int'l Law Man. vol. 28, p. 657. See also Bamako Convention on the ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 29 January 1991 which also provides that States Parties to the Convention shall develop a protocol on liability and compensation. For the Convention see, ibid., vol. 30, 1991, p. 773.

damage in the State of Washington in the future, as set forth therein, the Tribunal answers to Question No. 2...: (a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of Smelter to comply with the regulations herein prescribed or notwithstanding the maintenances of the regime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity ... " 28/ (Emphasis added)

(13) It is important to note that the requirement of payment of compensation by the Tribunal was not on the basis of negligence or fault.

(14) In the Lake Lanoux case, on the other hand, the Tribunal, responding to Spain's allegation that the French projects would entail an abnormal risk to Spanish interests, stated as a general matter that responsibility would not arise as long as all possible precautions against the occurrence of an injurious event had been taken. 29/ The Tribunal made a brief reference to the question of dangerous activities, by stating: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters." This passage may be interpreted as meaning that the Tribunal was of the opinion that abnormally

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28/ United Nations, Reports of International Arbitral Awards, vol. III, pp. 1980-1981. Emphasis added.

29/ The Tribunal stated:

"The question was lightly touched upon in the Spanish counter memorial, which underlined the 'extraordinary complexity' of procedures for control, their 'very onerous' character, and the 'risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9."

International Law Reports (1957), pp. 123-124, para. 6 of the award.

dangerous activities (as opposed to those originating risks which may be controlled) constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of transboundary harm to Spain, the decision of the tribunal might have been different.

(15) In the Nuclear Tests Case, the International Court of Justice, in making the Order of 22 June 1973, duly recited Australia's statement of its concerns that "the atmospheric nuclear explosions carried out by France in the Pacific had caused widespread radioactive fallout on Australian territory and elsewhere in the southern hemisphere, had given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radioactive material deposited on Australian territory could be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere created anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment could never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace could not be undone;". 30/

(16) In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that:

> "if the Court were to adopt the contention of the Australian request it would be near to enforcing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States." 31/

(17) He further stated that "[i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do

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30/ Nuclear Tests Case (Australia v. France), (Order of 22 June 1973), 1973 I.C.J. Reports, p. 104. The Court did not rule on merits of the case.

31/ Ibid., p. 132.

not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests." 32/ In his view, "[t]hose who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of law." 33/

(18) The Commission also takes note of a number of incidents in which, without admitting any liability, compensation was paid to the victims of significant transboundary harm. In this context, reference should be made to the following.

(19) The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area. They injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any reference to legal liability, agreed to pay compensation for harm caused by the tests. 34/

(20) In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States,

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32/ Ibid.

33/ Ibid.

34/ The United States Government stated that:

> "... The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained ... ... the United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands, in 1954 ...
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> It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million dollars, does so in full settlement of any and all claims against the United States of America or its agents, national or juridical entities for any and all injuries, losses or damage arising out of the said nuclear tests."

See The Department of State Bulletin, Washington, D.C., vol. 32, No. 812, 17 January 1955, pp. 90-91.

the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate ...". The report disclosed that in February, 1960, a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining $8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people". On 22 August 1964, President Johnson signed into law an act under which the United States assumed "compassionate responsibility" to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on March 1, 1954" and authorized $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap. 35/ According to another report, in June 1982 the Reagan Administration was prepared to pay $100 million to the Government of the Marshall Islands in settlement of all claims against the United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963. 36/

(21) In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good

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35/ Whiteman, op. cit., vol. 4, p. 567.

36/ International Herald Tribune, 15 June 1982, p. 5, col. 2.

neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border. 37/

(22) In 1971, the Liberian tanker Juliana ran aground and split apart off Niiagata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted. 38/ In this affair, the Liberian Government accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

(23) Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the Government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible". 39/ Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> "We are especially concerned to ensure observance of the principle established in the 1938 Trail Smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail Smelter case and we would expect that the same principle would be implemented in the present

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37/ Guggenheim, loc. cit., p. 169.

38/ The Times, London, 1 October 1974; Revue générale de droit international public, Paris, vol. 80, 1975, p. 842.

39/ Loc. cit.

situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference as a fundamental rule of international environmental law." 40/

(24) Canada, referring to the precedent of the Trail Smelter case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations.

(25) In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and destroyed some 10,000 litres of milk production per month. 41/ The facts about the case and the diplomatic negotiations that followed are difficult to ascertain. The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage. The reaction of the French authorities is unclear; it appears, however, that persons injured brought charges in French courts.

(26) During negotiations between the United States and Canada regarding a plan for oil prospecting in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting. Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove inadequate.

(27) In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its

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40/ Ibid., p. 334.

41/ See Annuaire suisse de droit international, 1974, Zurich, vol. 30, p. 147.

request, the highway did not offer sufficient guarantees for the security of property situated in United States territory, reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> "In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway." 42/

(28) In the case of the Rose Street Canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.

(29) In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.

(30) After the preceding examination of international practice, the Commission notes that treaty practice shows a clear tendency in imposing no-fault (*sine delicto*) liability for extraterritorial harm on the operators of activities or their insurers. 43/ This is standard practice in treaties

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42/ Whiteman, op. cit., vol. 6, p. 262.

43/ See for example, in area of oil pollution, the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, (UNTS, vol. 973, p. 3); the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971 (ibid,. vol. 1110, p. 57); The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources of 17 December 1976 (UNEP, Selected Multilateral Treaties ..., p. 474); the Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, of 1 December 1984 (IMO, LEG/CONF.6/66) - in the area of nuclear energy and material, the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (UNTS, vol. 956, p. 251); the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (UNEP, Selected Multilateral Treaties ..., p.171); the Convention on the Liability of Operators of Nuclear Ships of 1962 (AJIL, vol. 57, p. 268); the Vienna Convention on Civil Liability for Nuclear Damage, of 21 May 1963 (UNTS, vol. 1063, p. 265); the Convention relating to Civil Liability in the Field of Maritime of Carriage of Nuclear Material of 17 December 1971 (ibid., vol. 974, p. 255) - in the area of other activities, the Convention on the International Liability for Damage Caused by Space Objects of 29 March 1972 (UNTS, vol. 610, p. 205) and the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment of 9 March 1993.

primarily concerned with commercial activities. Some conventions, regulating activities undertaken mostly by private operators, impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes either for the whole compensation or that portion of it not satisfied by the operator. 44/

(31) On the other hand, the Convention on International Liability for Damage Caused by Space Objects of 1972 45/ holds the launching State absolutely liable for transboundary damage. This Convention is rather unique because, at the time of its conclusion, it was anticipated that the activities being regulated, because of their nature, would be conducted only by States. The Convention is further unique in that it allows the injured party the choice as to whether to pursue a claim for compensation through domestic courts or to make a direct claim against the State through diplomatic channels.

(32) The Commission finds it striking that the trend of requiring compensation is pragmatic rather than theoretically grounded in a consistent theory of liability. Liability of private operators, their insurers, and possibly States takes many forms in special circumstances. In the view of the Commission, international practice justifies further work on liability by the Commission in respect of significant transboundary harm of activities referred to in article 1.

Article D [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

44/ See for example article III of the 1962 Convention on the Liability of Operators of Nuclear Ships, op. cit. and article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, Int'l L. Mat., vol. 28, p. 868.

45/ Op. cit.

Commentary

(1) In the view of the Commission, cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in articles that are already adopted on prevention, in particular article 15 "Notification and information", article 16 "Exchange of information", article 16 bis "Information to the public", article 17 "National security and industrial secrets", article 18 "Consultations on preventive measures" and article 19 "Rights of the State likely to be affected". They envisage the participation of the affected State, which is indispensable to enhance the effectiveness of any preventive action. The affected State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem, etc.

(2) The article requires States concerned to cooperate in good faith. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." The Vienna Convention on the Law of Treaties and the Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition article 26 and paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of the International Court of Justice in the Nuclear Tests case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." 46/ This dictum of the Court implies that good faith applies also

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46/ I.C.J., Reports, 1974, p. 268.

to unilateral acts. 47/ Indeed the principle of good faith covers "the entire structure of international relations". 48/

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filtering with the Gulf of St. Lawrence La Bretagne, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively. 49/ In the Rainbow Warrior arbitration, the Tribunal in determining whether the French conduct was justified, used the criterion of whether France had made "a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement". 50/

(4) The words "States concerned", in the article, refer to the State of origin and the affected State or States. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

(5) The article provides that States shall as necessary seek the assistance of any international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words as necessary are intended to take account of a number of possibilities, including the following:

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention or minimization of transboundary harm. For example, the State of origin or the affected State may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent or minimize significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Second, the term "international organizations" is intended to refer to organizations that are relevant and in a position to assist in such matters.

47/ See M. Virally, review Essay of E. Zoller, La Bonne Foi en Droit International Public, 1977, in Am. J. Int'l L., vol. 77, p. 130.

48/ See R. Rosenstock, "The Declaration of Principles of International Law Concerning friendly Relations: A Survey", Am. J. Int'l L. vol. 65, p. 734.

49/ International Law Reports, vol. 82, p. 614.

50/ Ibid., p. 555.

Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Third, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourth, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, etc.

(10) The latter part of the article speaks of minimizing the effects "both in affected States and in States of origin". It anticipates situations in which, due to an accident, there is, in addition to significant transboundary harm, massive harm in the State of origin itself. These words are, therefore, intended to present the idea that, in many ways, significant harm is likely to be a nuisance for all the States concerned, harming the State of origin as well as the other affected States. Hence, transboundary harm should, to the extent possible, be looked at as a problem requiring common endeavours and mutual cooperation to minimize its negative consequences. These words, of course, do not intend to impose any financial costs on the affected State for minimizing harm or clean-up operation in the State or origin.

(11) The expression "affected State" means the State in the territory or otherwise under the jurisdiction or control of which the significant transboundary harm has occurred. This expression will eventually be moved to article 2 "Use of terms".

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STATE RESPONSIBILITY

Draft articles, with commentaries, adopted by the Commission for inclusion in Part Three and the Annex thereto

GE.95-62947 (E)

Part Three and the Annex

Introduction

(1) Since the earliest days of its work on the topic of State responsibility, the Commission has considered the possibility of including in the draft articles a part three containing provisions relating to the implementation (mise en oeuvre) of international responsibility and the settlement of disputes. At its fourteenth session in 1962, the International Law Commission decided to establish a Sub-Committee on State Responsibility to consider general aspects of the topic. Members of the Sub-Committee were requested to submit memoranda relating to the main aspects of the topic. Two of the members, namely Mr. Tsuruoka 1/ and Mr. Paredes, 2/ submitted papers in which they emphasized the importance of addressing dispute settlement procedures. However, the initial two-part programme of work for the topic of State responsibility that was proposed by the Sub-Committee and endorsed by the Commission at its fifteenth session in 1963 did not envisage a part three. 3/

(2) At its twenty-first session in 1969, the Commission began its substantive work on the topic of State responsibility with its consideration of the first report 4/ of Mr. Ago, the Special Rapporteur for the topic. 5/ At that session, the Commission reviewed its plan of work on State responsibility and decided to consider at a later stage the possibility of undertaking a third phase of work covering certain problems concerning the implementation of the international responsibility of a State and questions concerning the

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1/ Mr. Tsuruoka, submitted a paper in which he asserted that the principles to be included in a State responsibility convention would be ineffective and possibly remain inoperative in the absence of guarantees for their strict application. Yearbook ... 1963, vol. II, pp. 248-249, document A/5509, appendix II.

2/ Mr. Paredes submitted a memorandum entitled "An approach to State Responsibility" in which he outlined detailed proposals relating to the settlement of disputes. Ibid., pp. 245-246.

3/ Ibid., p. 227 et seq., annex I, document A/CN.4/152.

4/ Yearbook ... 1969, vol. II, p. 125, document A/CN.4/217 and Add.1.

5/ The Commission appointed Mr. Ago as Special Rapporteur for the topic at its fifteenth session in 1963.

settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility. 6/ The Commission's plan to proceed with its work on the topic in successive stages, including the possibility of a third stage relating to dispute settlement, met with general approval when the Commission's annual report was considered in the Sixth Committee of the General Assembly. 7/ At its subsequent sessions, the Commission consistently confirmed its intention to consider a possible part three of the draft articles.

(3) At its thirty-seventh session in 1985, the Commission began its consideration of a possible part three concerning the settlement of disputes based on the sixth report 8/ of Mr. Riphagen, the Special Rapporteur for the topic. 9/ While some members advised caution in the elaboration of dispute settlement provisions in the light of the hesitancy of States to accept third party procedures, such provisions were generally considered to be necessary for the implementation of the first two parts of the draft articles given the likelihood of disputes relating to State responsibility as well as the possible escalation of such disputes as a consequence of countermeasures. 10/

(4) At its thirty-eighth session in 1986, the Commission had before it the seventh report 11/ of Mr. Riphagen which contained draft articles for Part Three and the related Annex. The Commission considered the proposed draft articles in plenary and subsequently referred them to the Drafting

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6/ Yearbook ... 1969, vol. II (Part Two), p. 233, document A/7610/Rev.1, paras. 80-82.

7/ Official Records of the General Assembly, Twenty-first Session, Annexes, agenda items 86 and 94 b, document A/7746, paras. 86-89.

8/ Yearbook ... 1985, vol. II (Part One), p. 3, document A/CN.4/389.

9/ The Commission appointed Mr. Riphagen as Special Rapporteur for the topic at its thirty-seventh session in 1979.

10/ Yearbook ... 1985, vol. II (Part Two), p. 24, document A/40/10, paras. 159-161.

11/ Yearbook ... 1986, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

Committee. 12/ Since the referral to the Drafting Committee of the proposed draft articles comprising Part Three and the Annex, the Commission has assumed that provisions relating to the settlement of disputes would be included in the draft articles on State responsibility. 13/

(5) At its forty-fifth session in 1993, the Commission continued its consideration of issues relating to implementation and dispute settlement procedures based on the fifth report 14/ of Mr. Arangio-Ruiz, the Special Rapporteur on the topic. 15/ The Commission considered the new proposed draft articles comprising Part Three and the Annex and referred them to the Drafting Committee, which also had pending before it the proposals of the previous Special Rapporteur on the same subject. 16/

(6) The present Special Rapporteur - following in part his predecessor Professor Riphagen - envisaged different dispute settlement obligations depending on whether compliance with such obligations would be meant, under the future State responsibility convention, to precede or to follow the taking of countermeasures. The first set of obligations - which would not derive from the convention - was contemplated in draft article 12 (as proposed by the Special Rapporteur in his fourth report). According to this article, no countermeasures could lawfully be taken by an injured State prior to: "(a) the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it is a party; and (b) appropriate and timely communication of its intention." 17/ Such conditions would not apply,

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12/ Yearbook ... 1986, vol. II (Part Two), pp. 36-37, document A/41/10, paras. 41-46.

13/ Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Supp. No. 10, p. 34, document A/47/10, para. 108.

14/ Document A/CN.4/453.

15/ The Commission appointed Mr. Arangio-Ruiz as Special Rapporteur for the topic at its thirty-ninth session in 1987.

16/ Report of the International Law Commission on the work of its forty-fifth session, 3 May-23 July 1993, Supp. No. 10, p. 80, document A/47/10, para. 205.

17/ Document A/CN.4/444, para. 52.

however, in the case of urgent measures of protection and whenever the wrongdoing State did not cooperate in good faith in the choice and implementation of the available settlement procedures. Thus, draft article 12, as envisaged by the Special Rapporteur, would not create any new dispute settlement obligations. It would merely rely on dispute settlement obligations originating in sources other than the convention and undertaken before or after the entry into force thereof.

(7) In contrast, Part Three, as proposed by the Special Rapporteur in his fifth report, was meant to establish new dispute settlement obligations for State parties in relation to disputes that arose after the taking of countermeasures. 18/ The proposed procedures envisaged conciliation, arbitration or judicial settlement to be resorted to unilaterally by either party for the settlement of any dispute which had arisen following the adoption of countermeasures and which was not settled by resort to the procedures referred to in article 12 (1) (a) or submitted to a binding third party settlement procedure within a reasonable time limit. In the Special Rapporteur's view, the two sets of dispute settlement proposals contemplated in article 12 and Part Three should have been considered by the Drafting Committee jointly in view of the close interrelationship and possible interaction between them.

(8) Indeed, the parties to a future State responsibility convention could be bound by all kinds of dispute settlement obligations deriving either from multilateral treaties (such as the United Nations Charter or regional instruments), bilateral treaties or compromissory clauses or unilateral declarations of acceptance of the Optional Clause of Article 36 of the Statute of the International Court of Justice. As had rightly been pointed out by a number of members in the course of the present session, the problem of the coexistence of the dispute settlement obligations to be envisaged in Part Three with any other dispute settlement obligations of the participating States, whether undertaken prior or subsequent to their participation in the convention, obviously arose regardless of the solutions originally proposed by the Special Rapporteur in draft article 12 (1) (a). The Special Rapporteur found it therefore doubly regrettable that, due to the need to give priority to other topics in 1993, 1994 and 1995, the Drafting Committee had been unable

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18/ Document A/CN.4/453/Add.1 and Corr.1-3.

to elaborate all the dispute settlement provisions simultaneously in such a way as to be able to take account of any interaction between the dispute settlement obligations arising from the future State responsibility convention, on the one hand, and dispute settlement obligations deriving from any other source (including other codification conventions), on the other hand.

(9) The Commission recognized that the adoption of the articles contained in Part Three and the Annex was without prejudice to its future work on any related aspects of the subject matter. The Commission recognized, in particular, the need to consider the problem of the coexistence of dispute settlement obligations under Part Three of the State responsibility draft with any dispute settlement obligations deriving from any other instruments preceding or following the coming into force of a State responsibility convention. The Commission agreed to adopt the draft articles contained in Part Three and the Annex on the basis of these understandings with respect to its future work.

(10) Finally, the Commission also recognized that in resuming work on dispute settlement, it should also consider the proposal contained in the Special Rapporteur's seventh report concerning the settlement of disputes relating to the internationally wrongful acts characterized as State crimes under article 19 of Part One of the draft.

Part Three

Settlement of Disputes

Article 1

Negotiation

If a dispute regarding the interpretation or application of the present draft articles arises between two or more States Parties to the present draft articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Commentary

(1) Article 1 provides for negotiations as a possible first step in the general dispute settlement system. The broad reference to "a dispute regarding the interpretation or application of the present draft articles" indicates that this provision is part of the general dispute settlement provisions. The consideration of negotiation in the first article of Part Three identifies this method of dispute settlement as the first step in the general dispute settlement system. Negotiation is often the first step in any dispute settlement process either as a means of settling the dispute or

reaching agreement on an appropriate dispute settlement procedure or implementing a pre-existing dispute settlement arrangement, for example, by determining the factual issues and the legal issues that constitute the dispute that is to be resolved. The use of the term "negotiation" does not exclude the possibility that the parties may also engage in "consultations" during this first step in the dispute settlement process.

(2) Article 1 provides for negotiation at the request of any party to a dispute relating to the interpretation or the application of the present draft articles. This article recognizes that such a dispute may arise "between two or more States Parties to the present draft articles". The phrase "upon the request of any of them" is used to indicate that the negotiations may be instituted upon the unilateral request of either an injured State or an allegedly wrongdoing State.

(3) The compulsory nature of the negotiation procedure is indicated by the use of the phrase "they shall". The request by one party to the dispute gives rise to the obligation on the part of all parties to the dispute to participate in the negotiations in good faith with a view to settling the dispute. The initiation of the negotiations by "request", a formality that is not usually required for negotiations, is intended to avoid any ambiguity as to the event that gives rise to the obligations of all parties to endeavour to resolve it by negotiation. The phrase "seek to settle it amicably by negotiation" indicates that the obligation to negotiate is one of means rather than result. The parties to the dispute are obligated only to negotiate and not to settle the dispute by means of negotiation. The term "amicably" is used to indicate the conditions that should prevail between the parties in conducting the negotiations with a view to reaching an agreed settlement of their dispute.

(4) The procedural obligation to negotiate provided for in the present article represents a possible restriction on the freedom of choice of the parties to the dispute with respect to settlement procedures in the absence of a more rigorous agreed procedure. However, the parties retain complete control over the compulsory negotiation procedure because of the absence of any third party participation. Furthermore, the results of the negotiations are binding on the parties only to the extent that they agree on a settlement or a settlement procedure.

Article 2

Good offices and mediation

Any State Party to the present draft articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Commentary

(1) Article 2 provides for good offices or mediation as a possible further step in the general dispute settlement system. This provision applies to the same broad category of disputes as contemplated in the preceding article.

(2) There are two ways in which the good offices or mediation procedure envisaged in the present article may be initiated. First, a State which meets the two criteria required to perform the role of the third party in these procedures "may, upon its own initiative ... tender its good offices or offer to mediate". The State must be a party to the draft articles on State responsibility. Any State which is a party to a convention has an interest in the resolution of disputes relating to the interpretation or the application of its provisions. In addition, the third State must not be a party to the dispute. The objectivity and impartiality of the third party is essential to the effective performance of its role in facilitating the resolution of the dispute between the parties. The recognition of the right of such a State to offer to assist the parties in resolving their dispute is intended to avoid the possibility of such an offer being viewed by the parties as an inappropriate attempt to intervene in their dispute. Second, any party to the dispute may request the good offices or mediation procedure envisaged in article 2. The third party procedure initiated by the request of a party to the dispute may be conducted by any State which meets the two criteria.

(3) The second step in the general dispute settlement system is consensual in nature with respect to both the initiation of the procedure and the settlement of the dispute at the conclusion of the procedure. While either the injured State or the wrongdoing State may request good offices or mediation, this third party dispute settlement procedure can be initiated only with the agreement of the parties to the dispute. In this regard, article 2 is consistent with the freedom of choice principle with respect to dispute settlement procedures. Furthermore, the role of the third party is limited "to facilitating an amicable resolution of the dispute." The resolution of the dispute as a consequence of this procedure will depend upon the agreement of the parties to the dispute. The term "amicable" is used to indicate the conditions that should prevail between the parties in seeking to achieve an agreed settlement of their dispute by means of the agreed third party procedure.

(4) It is not necessary for the parties to the dispute to have either initiated or completed the compulsory negotiations envisaged in article 1 before agreeing to good offices or mediation under article 2. The parties may agree to attempt to resolve their dispute with the participation of a third party under either of these procedures without any party to the dispute having initiated the compulsory negotiations provided for in article 1. Even if such negotiations have been initiated, the parties may decide that the dispute is unlikely to be resolved by negotiation and agree to proceed to a third party procedure such as those envisaged in article 2. The good offices or mediation procedure may also be viewed as auxiliary to the negotiations of the parties since the purpose of these third party procedures is to facilitate an agreed settlement of the dispute by the parties.

Article 3

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present draft articles.

Commentary

(1) Article 3 provides for conciliation as a possible third step in the general dispute settlement system. This article applies to the same broad category of disputes as the two preceding articles. Similarly, the 1949 General Act for the Pacific Settlement of International Disputes provides in article 1 for conciliation in the event that the parties to a dispute are unable to resolve it by means of diplomacy. 19/ The 1969 Vienna Convention on the Law of Treaties also provides in article 66 for conciliation if a dispute cannot be resolved by the parties through the means listed in Article 33 of the United Nations Charter. 20/

(2) The present provision is intended to address situations in which a dispute has not been resolved within a reasonable period by the compulsory negotiations envisaged in article 1 and no binding third party dispute settlement procedure has been instituted. Any party to the dispute may

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19/ United Nations, Treaty Series, vol. 71, p. 101.

20/ United Nations, Treaty Series, vol. 1155, p. 331.

initiate unilaterally the conciliation procedure provided for in the present article if two conditions are met. First, the parties to the dispute have failed to reach an agreed settlement of their dispute by whatever means three months after the request for negotiations under article 1. Second, the parties have failed to actually institute and submit their dispute to a binding third party settlement procedure by the end of the same period.

(3) The first condition is intended to give the parties to the dispute a reasonable opportunity to settle their differences without the intervention of a third party. The conciliation procedure provided for in the present article cannot be activated until the parties have attempted to resolve their dispute by means of negotiation for a reasonable period. The 1949 Revised Geneva Act for the Pacific Settlement of International Disputes provides for a similar approach.

(4) The second condition is intended to give preference to the freedom of choice of the parties with respect to the selection of a more rigorous binding third party procedure to settle their dispute. There are two ways in which the parties may institute such a procedure. The parties may institute a binding third party procedure on the basis of a prior agreement or arrangement, for example, a general dispute settlement agreement, an applicable treaty containing a specific dispute settlement provision, or the prior acceptance by the parties of the optional clause contained in Article 36 of the Statute of the International Court of Justice. The parties may also institute such a procedure pursuant to an agreement adopted subsequent to the dispute for the specific purpose of resolving that dispute. The phrase "has been instituted" is very important. It is intended to ensure that the dispute has actually been submitted to a binding third party procedure in one way or the other.

(5) Article 3 permits a party to unilaterally initiate conciliation to avoid the possibility of lengthy negotiations being used as a pretext by one of the parties to delay the settlement of the dispute. Three months was considered to provide the parties with a sufficient period to determine whether it could be resolved by means of negotiation, and, if not, to institute a binding third party procedure of their choice. Both parties may agree to continue the negotiations if neither party decides to unilaterally institute the conciliation procedure envisaged in the present article.

(6) The injured State or the allegedly wrongdoing State may submit the dispute to conciliation under the present article without the consent of any other party to the dispute if the necessary conditions are met. The compulsory nature of the conciliation procedure provided for in the present article constitutes a step forward in the area of dispute settlement procedures by providing for the participation of a third party in the settlement of the dispute without the consent of all of the parties to the dispute. However, the results of the conciliation are binding on the parties only to the extent that they reach an agreed settlement.

(7) The constitution and the task of the conciliation commission are determined by the Annex and the succeeding article for the purpose of ensuring that the compulsory conciliation procedure envisaged in the present article is not delayed or precluded by the failure of the parties to agree on such matters.

Article 4

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Commentary

(1) Article 4 sets forth the task of the Conciliation Commission provided for in the preceding article. Paragraph 1 defines in broad terms the general task entrusted to the Conciliation Commission, namely (1) to elucidate the questions of law or fact that are disputed by the parties, (2) to collect the information required to shed light on those questions by means of inquiry or otherwise and (3) to endeavour to bring the parties to an agreed settlement of their dispute. This paragraph is similar to article 15 of the Revised General Act for the Pacific Settlement of International Disputes 21/ and article 15 of the 1957 European Convention for the Peaceful Settlement of Disputes. 22/ The remaining paragraphs address in greater detail the performance of this general task in four possible stages.

(2) Paragraph 2 addresses the information gathering stage of the conciliation procedure. The starting-point for the work of the Conciliation Commission is the ascertainment of the position of the parties to the dispute and the identification of the areas of agreement or disagreement. The parties have an obligation to provide the Conciliation Commission with "a statement of their position regarding the dispute and of the facts upon which that position is based" as the first step in the information gathering stage. The Conciliation Commission may require additional information for a proper determination of the relevant facts that are at issue between the parties. Thus, the parties have an obligation to "provide the Commission with any further information or evidence as the Commission may request". The Conciliation Commission may also use a variety of means such as inquiry to gather any other information that may be required to propose a recommended settlement to the parties.

(3) The Conciliation Commission may consider it necessary to conduct independent fact-finding to gather relevant information concerning the dispute. This may include fact-finding within the territory of one or more parties to the dispute depending on the particular facts that are at issue. The parties have an obligation to "assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical." The Conciliation Commission would need to consult with the

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21/ United Nations, Treaty Series, vol. 71, p. 101.

22/ E.T.S. No. 23.

party to make the necessary practical arrangements for carrying out this fact-finding. The obligation of a State party to a dispute to permit fact-finding within its territory is a significant advancement over the present stage of development of the law relating to the peaceful settlement of disputes which generally requires the consent of the State. The Commission was of the view that the parties should permit fact-finding within their territories where necessary to resolve the dispute. The Commission also recognized that there may be exceptional cases in which it would be impractical for a State to permit such fact-finding. In such a case, the party must provide the Conciliation Commission with an explanation of the exceptional reasons for refusing to permit the fact-finding. This requirement is intended to enable the Conciliation Commission to determine whether the refusal is merely an attempt to obstruct the settlement process. The Conciliation Commission may draw appropriate inferences with respect to the disputed facts from the refusal of a party to the dispute to permit fact-finding within its territory. 23/

(4) Paragraph 3 addresses the second stage in the conciliation procedure. After completing the initial information gathering stage, the Conciliation Commission "may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations." These preliminary proposals may serve to expedite the dispute settlement process if the parties agree to the proposed settlement. This optional stage is also intended to provide the Conciliation Commission with an opportunity to obtain the views of the parties with respect to its proposed solution and, if it is

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23/ This is consistent with the decision of the International Court of Justice in the Corfu Channel case in which the Court stated as follows:

> On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.

Corfu Channel (Merits, Judgment), I.C.J. Reports 1949, p. 18.

not acceptable, to prepare a revised final recommendation in a further effort to achieve a settlement. The Conciliation Commission is not required to submit, nor are the parties entitled to request, any preliminary proposals.

(5) Paragraph 3 is also intended to allow the Conciliation Commission to make preliminary proposals in the nature of interim measures. These measures may, for example, call upon the parties to the dispute to refrain from any action that might cause irreparable harm or further complicate the task of settling the dispute. The Conciliation Commission may propose, on its own initiative and at its discretion, any appropriate interim measures with a view to facilitating a settlement of the dispute. The parties are not entitled to request such measures. The interim measures would be recommendatory in nature in accordance with the non-binding character of the conciliation procedure. The Vienna Convention on the Law of Treaties also provides that the conciliation commission envisaged in the annex thereto "may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement." 24/

(6) Paragraph 4 concerns the third stage in the conciliation procedure. After gathering the necessary information and consulting the parties regarding any preliminary proposals, the Conciliation Commission is required to submit to the parties a report containing its recommendations for settling the dispute not later than three months after it has been constituted. This was considered to provide the Conciliation Commission with a reasonable period for completing its task. Furthermore, this relatively short period would not substantially delay the initiation of other dispute settlement procedures if the dispute could not be resolved by conciliation. The Conciliation Commission may specify in its report a period in which the parties are to respond to its recommendations. The parties may respond favourably to the recommendations resulting in an agreed settlement of the dispute. The parties may also respond by indicating that they have certain difficulties with the recommendation. The Conciliation Commission would have an opportunity in the latter instance to consider the views of the parties in making a further attempt to resolve the dispute, as provided for in paragraph 5 of the present article. The Conciliation Commission may impose time-limits on the parties for the submission of their observations on its recommendations to avoid

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24/ United Nations, Treaty Series, vol. 1155, p. 331.

unreasonable delay in the dispute settlement process. The use of the term "recommendations" is consistent with the non-binding character of the conciliation procedure.

(7) Paragraph 5 provides for a possible fourth stage in the conciliation procedure if the parties' response to the Conciliation Commission's recommendations has not resulted in an agreed settlement of the dispute. This final stage is intended to give the Conciliation Commission one last opportunity to bring the parties to the dispute to an agreed settlement. In view of the response of the parties, the Conciliation Commission may conclude that with some adjustments its recommendation may provide a basis for an agreed settlement. Thus, the Conciliation Commission may submit to the parties "a final report containing its own evaluation of the dispute and its recommendations for settlement." This is intended to enable the Conciliation Commission to provide the parties with its own assessment of the situation with a view to facilitating an agreed settlement of the dispute rather than its evaluation of the appropriateness of the parties' responses to its recommendations. However, the Conciliation Commission may conclude that submitting a final report would not serve any useful purpose and therefore decide not to submit such a report. For example, the response of the parties may indicate that the Conciliation Commission's recommendation or any variation thereof does not provide a basis for an agreed settlement or the parties may have agreed to initiate another dispute settlement procedure.

Article 5

Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

2. In cases, however, where the dispute arises between States parties to the present draft articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

Commentary

(1) Article 5 provides for two types of arbitration, namely, (1) voluntary arbitration by agreement of the parties to the dispute in the context of the

general dispute settlement system, and (2) compulsory arbitration at the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures as a special regime for settling disputes involving the use of countermeasures.

(2) Paragraph 1 provides for arbitration by agreement of the parties to the dispute as the fourth step in the general dispute settlement system. It is intended to address situations in which the dispute has not been resolved within a reasonable period as a result of any of the first three steps in the general dispute settlement system provided for in articles 1, 2 and 3 or by any other means. The present paragraph provides that the parties may agree to submit their dispute to arbitration in two situations: (1) the conciliation procedure envisaged in article 3 has not been instituted or (2) the conciliation procedure has been instituted but the parties have failed to reach an agreed settlement of their dispute six months after the Conciliation Commission's non-binding report. The Revised General Act for the Pacific Settlement of International Disputes also provides in article 21 for the possibility of arbitration in the event that a prior conciliation procedure has failed to result in the parties' agreed settlement of their dispute. 25/

(3) The present paragraph is intended to provide for the possibility of a binding third party dispute settlement procedure as an effective means of settling disputes between States parties to the present draft articles within the framework of the general dispute settlement system. The parties may prefer to first attempt to settle their dispute by means of negotiations without the participation of a third party or by means of a non-binding third party procedure before submitting their dispute to a binding third party procedure. However, the parties may also prefer to expedite the dispute settlement process by agreeing to submit their dispute to arbitration or judicial settlement without first attempting to resolve the dispute by other means. Similarly, the parties to the dispute may by agreement determine the terms of reference and the constitution of the arbitral tribunal. In the absence of such an agreement, the parties may submit their dispute to an arbitral tribunal which is constituted in conformity with the Annex and which has the terms of reference provided for in the succeeding article. These

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25/ United Nations, Treaty Series, vol. 71, p. 101.

residual provisions are intended to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters and that the agreement of the parties to settle their dispute by means of arbitration can be effectively implemented.

(4) Paragraph 2 establishes a special regime of compulsory arbitration if a dispute arises in which the injured State has taken countermeasures. In such a case, the allegedly wrongdoing State which is the object of the countermeasures has the right to initiate unilaterally compulsory arbitration. The injured State for its part does not have the right to unilaterally institute the arbitral proceedings. Rather it is bound after having taken countermeasures to submit to arbitration. The exceptional nature of the special dispute settlement regime for disputes involving the use of countermeasures is indicated by the phrase "In cases, however". Thus, the allegedly wrongdoing State may institute the arbitral proceedings without attempting to first resolve the dispute by any of the other means envisaged in the general dispute settlement system. The phrase "at any time" is used to avoid any ambiguity in this regard.

(5) The countermeasure is the event that triggers the unilateral right of the allegedly wrongdoing State to institute compulsory arbitration. However, the scope of the arbitral proceedings extends not only to the lawfulness of the countermeasure, but also to the underlying dispute which led the injured State to take the countermeasure. This dispute, in its turn, may include not only issues relating to the secondary rules contained in the draft articles on State responsibility, but also the primary rules that are alleged to have been violated. As a practical matter, it would be difficult for an arbitral tribunal to determine the lawfulness of countermeasures without considering such related questions as whether a primary rule has been violated and whether the violation is attributable to the allegedly wrongdoing State. The broader approach to the scope of the arbitral proceedings would also promote a more complete, efficient and effective settlement of the dispute by resolving all of the related issues. There were different views in the Commission as to whether the draft articles on State responsibility should contain such far-reaching dispute settlement provisions.

(6) The terms of reference and the constitution of the arbitral tribunal for purposes of the compulsory arbitration are determined by the succeeding article and the Annex to ensure that the arbitral proceedings are not delayed or precluded by the failure of the parties to agree on such matters.

Article 6

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles, shall operate under the rules laid down or referred to in the Annex to the present draft articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Commentary

(1) Article 6 defines the general terms of reference of the Arbitral Tribunal referred to in articles 5 and 7 (2).

(2) Paragraph 1 provides that the Arbitral Tribunal shall decide "any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles". The first criterion recognizes that the dispute referred to the Arbitral Tribunal is determined by the issues of fact or law that are identified by the parties to the dispute as the subject of their disagreement. The second criterion is standard language used in the dispute settlement provisions contained in international agreements. The Commission recognized that this criterion required a degree of flexibility in the context of the present draft articles to ensure a resolution of the dispute between the parties. The Arbitral Tribunal may need to consider various factual and legal issues in order to resolve a dispute concerning the interpretation or the application of the provisions of the present draft articles, including those relating to countermeasures. For example, the Arbitral Tribunal may need to consider issues regarding the primary rules of international law relied on by the parties, the alleged violations of these rules, the attribution of any such violation to the allegedly wrongdoing State, the lawfulness of any countermeasures and the consequences of a violation of international law by either party with respect to any initial wrongful act or any unlawful

countermeasures. The phrase "any issue" is used to cover all issues of fact or law that may need to be decided by the Arbitral Tribunal to settle the dispute between the parties relating to the present draft articles.

(3) Paragraph 1 also provides that the Arbitral Tribunal shall decide any relevant issues "with binding effect" in conformity with the customary binding nature of arbitral awards. The Arbitral Tribunal may also need to issue binding interim or protective measures to facilitate a resolution of the dispute between the parties, including ordering the cessation of the wrongful act and the suspension of countermeasures. These measures would be of an interim nature pending the final resolution of the dispute by means of the arbitral award. The Arbitral Tribunal has the inherent power to issue such binding interim or protective measures as may be necessary to ensure the effective performance of the task with which it has been entrusted, namely the resolution of the dispute between the parties. This is consistent with the binding nature of this third party dispute settlement procedure. The Commission considered that the powers and procedures of an arbitral tribunal, including the power to order interim measures, were generally understood and did not need to be elaborated in the present paragraph.

(4) The present article provides that the Arbitral Tribunal must submit its decision to the parties "within six months from the date of completion of the parties' written and oral pleadings and submissions". The Commission considered it useful to provide a time limit for the completion of the work of the Arbitral Tribunal and that six months from the date of the final submissions of the parties was a reasonable period for doing so.

(5) Paragraph 2 provides that the Arbitral Tribunal "shall be entitled to resort to any fact-finding it deems necessary for the determination of the case". This paragraph recognizes the importance of an arbitral tribunal being able to resort to fact-finding when it considers this to be necessary to determine the facts at issue between the parties. The Arbitral Tribunal is entitled to engage in "any fact-finding" that it considers to be necessary to resolve the disputed factual issues, including fact-finding within the territory of a party to the dispute. Although the parties are not obligated to permit such fact-finding under this paragraph, the Commission considered that they should be encouraged to do so to facilitate the work of the Arbitral Tribunal and the settlement of their dispute. Furthermore, the Arbitral

Tribunal should be permitted to draw appropriate inferences from a party's refusal to permit such fact-finding, as discussed in relation to article 4.

Article 7

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of tne challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with the Annex to the present draft articles.

Commentary

(1) Article 7 addresses the situation that may arise following an arbitration when one of the parties to the dispute challenges the validity of the resulting arbitral award. This situation may arise with respect to a dispute that is submitted to arbitration by agreement under the general dispute settlement system or by the unilateral initiative of an allegedly wrongdoing State that is the object of countermeasures under the special dispute settlement regime. This article is intended to discourage a party to any dispute from asserting frivolous claims of nullity as a means of avoiding compliance with an unfavourable arbitral award. It is also intended to prevent a party to a dispute involving the use of countermeasures from undermining the special dispute settlement regime with respect to those disputes by ignoring the results of the compulsory arbitration based on spurious assertions of nullity. If the parties fail to institute another procedure for settling the dispute relating to the validity of the award, the present article provides for an effective mechanism for resolving this dispute by instituting proceedings before the International Court of Justice at the unilateral request of any party. There were different views as to whether these situations should be addressed in Part Three. Some members expressed concern about adding an additional layer to the dispute settlement process by introducing a role for the International Court of Justice in relation to arbitral proceedings. The Commission decided to include the present article - not to provide for an appeal procedure - but to ensure the

effectiveness of the arbitration envisaged in article 5 as a means of settling disputes between States parties to the present draft articles. This provision is similar to articles 36 and 37 of the Model Rules on Arbitral Procedure.

(2) Paragraph 1 is intended to ensure the availability of an effective mechanism for resolving questions relating to the validity of an arbitral award. This paragraph provides that any party to the dispute may, by making a timely request, unilaterally refer a dispute relating to the validity of an arbitral award to the International Court of Justice if two conditions are met. First, any party to the dispute has challenged the validity of the arbitral award. Second, the parties have failed to agree to submit the dispute concerning the validity of the arbitral award to another tribunal within three months of the date of the award. The timeliness of the challenge of the validity of an arbitral award and the corresponding request for a judicial determination of its validity may vary depending on the particular grounds for nullity, as recognized in the Model Rules on Arbitral Procedure. 26/

(3) The competence of the International Court of Justice in the judicial proceedings envisaged in the first paragraph of the present article would be limited to either (1) confirming the validity of the arbitral award in the absence of any grounds for nullity or (2) declaring the total or partial nullity of the award on specified grounds. The Commission noted that the possible grounds for challenging the validity of an arbitral award were set forth in article 35 of the Model Rules on Arbitral Procedure. 27/ The

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26/ Article 36 of the Model Rules permits a party to challenge the validity of an arbitral award within six months of the rendering of the award on the following two grounds: (1) the tribunal has exceeded its powers or (2) the tribunal has failed to state the reasons for the award or seriously departed from a fundamental rule of procedure. The same article provides that a party may also challenge the validity of the arbitral award within 6 months of the discovery of relevant information and in any event within 10 years of the rendering of the award on the following 2 grounds: (1) corruption on the part of a member of the tribunal or (2) the nullity of the undertaking to arbitrate or the compromis. Yearbook ... 1958, vol. II, p. 86.

27/ Article 35 of the Model Rules on Arbitration provides as follows:

The validity of an award may be challenged by either party on one or more of the following grounds:

(a) That the tribunal has exceeded its powers;

Court would not be competent to review the factual or the legal determinations of the arbitral tribunal or the merits of the award. Thus, the present paragraph provides for a limited judicial proceeding concerning the validity of an arbitral award and not an appellate or a general review proceeding with respect to the merits of the award. There have been two such proceedings before the International Court of Justice. 28/ The arbitral award would remain final and binding on the parties to the dispute in the absence of a declaration of nullity. A decision of the International Court of Justice confirming the validity of an arbitral award would not provide a basis for recourse to the Security Council in the event of non-compliance with the arbitral award under Article 94 of the United Nations Charter since the obligations with respect to the settlement of the dispute are incumbent upon the parties by virtue of the arbitral award rather than the judicial decision confirming its validity. A proposal to provide such roles for the Court and the Security Court with respect to a party's non-compliance with an arbitral award was not accepted.

(4) Paragraph 2 addresses the situation in which the arbitral proceeding has failed to resolve the dispute between the parties as a consequence of a subsequent judicial proceeding declaring the invalidity of all or part of the arbitral award. The present paragraph provides that any party to the dispute may unilaterally submit the dispute consisting of the unresolved issues to a new arbitration in conformity with article 6. This arbitral proceeding could be viewed as the continuation or the completion of the voluntary arbitration agreed to by the parties or the compulsory arbitration initiated by the allegedly wrongdoing State against which countermeasures were taken under paragraphs 1 and 2, respectively, of article 5. The term "new" is used to indicate that the dispute consisting of the unresolved issues is to be settled

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(b) That there was corruption on the part of a member of the tribunal;

(c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

(d) That the undertaking to arbitrate or the compromis is a nullity.

Yearbook ... 1958, vol. II, p. 86.

28/ See the Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: ICJ Reports 1960, p. 192 and Arbitral Award of 31 July 1989, Judgment, ICJ Reports 1991, p. 53.

by a new arbitral tribunal constituted in conformity with the Annex and with the terms of reference provided for in article 6. This is intended to ensure the availability of an effective procedure for resolving the continuing dispute between the parties without any unnecessary delay.

Annex

Article 1

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present draft articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of Part Three by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The 4 conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The 4 conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Commentary

(1) Article 1 of the Annex provides for the constitution and the procedure of the Conciliation Commission envisaged in article 3 of Part Three.

(2) Paragraph 1 provides for a list of conciliators consisting of qualified jurists to be drawn up and maintained by the Secretary-General of the United Nations. Such a list is intended to facilitate the constitution of a conciliation commission without unnecessary delay following the initiation of this procedure under article 3 of Part Three. The present paragraph is similar to paragraph 1 of the Annex to the Vienna Convention on the Law of Treaties.

(3) Paragraph 2 establishes the procedure by which a party to the dispute may unilaterally initiate the compulsory conciliation provided for in article 3 of Part Three, namely by submitting a request to the Secretary-General leading to the constitution of the Conciliation Commission. The present paragraph, which is self-explanatory, sets out the procedure for the constitution of the Conciliation Commission and the selection of its chairman. This provision is similar to paragraph 2 of the Annex to the Vienna Convention on the Law of Treaties.

(4) Paragraph 3 provides for the continuation of the compulsory conciliation envisaged notwithstanding the failure of a party or parties to the dispute to participate in the procedure. The present paragraph is similar to article 12 of Annex V of the United Nations Law of the Sea Convention.

(5) Paragraph 4 addresses the situation in which there is a disagreement between the parties as to the competence of the Conciliation Commission. This paragraph provides that the Conciliation Commission shall decide any such question. This is a generally recognized principle with respect to third party dispute settlement procedures. The present paragraph is similar to article 13 of Annex V of the United Nations Law of the Sea Convention.

(6) Paragraph 5 provides that the Conciliation Commission shall determine its own procedure. It further provides that the Commission shall take "decisions" by a majority vote of the five members. The term "decisions" must be viewed in the light of the non-binding character of the conciliation procedure under which the Conciliation Commission's decisions are recommendatory in nature. This paragraph is similar to paragraph 3 of the Annex to the Vienna Convention on the Law of Treaties.

(7) Part Three recognizes that disputes may arise involving more than two State parties to the draft articles on State responsibility. Paragraph 6 of the present article indicates that the provisions relating to the constitution of the Conciliation Commission shall apply to multilateral disputes to the extent possible. This paragraph is similar to article 3 (h) of Annex V of the United Nations Law of the Sea Convention.

Article 2

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 5 and 7 (2) of Part Three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be

made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

Commentary

(1) Article 2 of the Annex provides for the constitution and the procedure of the Arbitral Tribunal envisaged in article 5 of Part Three.

(2) Paragraph 1 provides that the Arbitral Tribunal shall consist of five members, including the Chairman, appointed in conformity with the procedure set forth in the present paragraph. This provision, which is self-explanatory, is similar to article 22 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 of Annex VII to the United Nations Convention on the Law of the Sea. The Commission did not consider it necessary to provide for the maintenance of a list of potential arbitrators, as provided for in the latter instrument.

(3) Paragraph 2 addresses the situation in which there is a failure to appoint one or more members of the Arbitral Tribunal by the procedure envisaged in the preceding paragraph within a reasonable period of time. Three months following the request for the constitution of the Arbitral Tribunal was considered to provide a sufficient period for the appointment of its members. In such a case, the President, Vice-President or the senior member of the International Court of Justice would appoint the remaining

members of the Arbitral Tribunal, as envisaged in the present paragraph. This paragraph is intended to avoid any unreasonable delay in the constitution of the arbitral tribunal by providing an effective means for the appointment of its members by an objective and impartial third party in the event that the procedure envisaged in paragraph 1 fails to result in the appointment of all five members. The appointments made under the present paragraph may result in one - but not more than one - member of the Arbitral Tribunal being a national of a party to the dispute in accordance with paragraph 1. The additional conditions provided for in paragraph 2 are further attempts to ensure the impartiality of the members appointed by the procedure envisaged in the present paragraph. Paragraph 2 is similar to article 3 of Annex VII to the United Nations Convention on the Law of the Sea and article 3 of the Model Rules on Arbitral Procedure.

(4) Paragraph 3 provides for the appointment of a member of the Arbitral Tribunal in the event of a vacancy by the same procedure provided for the initial appointment. The phrase "within the shortest possible time" is intended to avoid any unnecessary delay in the arbitral procedure. This paragraph is similar to article 24 of the 1949 Revised General Act for the Pacific Settlement of Disputes and article 3 (f) of Annex VII of the United Nations Law of the Sea Convention.

(5) Paragraph 4 recognizes the obligation of the parties to agree on the specific subject-matter of the dispute to be submitted to arbitration, once the Arbitral Tribunal has been established, if they have not already done so. This paragraph is consistent with the customary practice in arbitration. It is similar to article 25 of the 1949 Revised General Act for the Pacific Settlement of Disputes

(6) Paragraph 5 enables the Tribunal to determine the dispute based on the application for arbitration if the parties have failed to agree as envisaged in the preceding paragraph three months after the constitution of the Arbitral Tribunal. The present paragraph is intended to avoid any unnecessary delay in the commencement of the arbitral procedure once the Tribunal has been constituted. Paragraphs 4 and 5 are similar to article 8 of the Model Rules on Arbitral Procedure.

(7) Paragraph 6 provides for the continuation of the arbitral procedure in the event of the failure of a party to participate in the procedure. This provision is intended to ensure that the dispute is effectively resolved by

means of arbitration notwithstanding any attempt by a party to obstruct the dispute settlement process. This paragraph is similar to article 9 of Annex VII to the United Nations Convention on the Law of the Sea. Article 1, paragraph 3 of the present Annex contains a similar provision with respect to conciliation.

(8) Paragraph 7 indicates that the Arbitral Tribunal shall determine its own procedure unless the parties have otherwise agreed with respect to its procedure. Decisions of the Tribunal are to be taken by a majority vote. This paragraph is similar to article 5 of Annex VII to the United Nations Convention on the Law of the Sea and article 12 of the Model Rules on Arbitral Procedure.